

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Caitlin Schwartz	Team: Squad #11	CCRB Case #: 201508105	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 09/04/2015 1:33 AM	Location of Incident: Baisley Boulevard and 168th Street	Precinct: 113	18 Mo. SOL 3/4/2017	EO SOL 3/4/2017	
Date/Time CV Reported Thu, 09/24/2015 3:07 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Thu, 09/24/2015 3:07 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Timothy Rizzo	07939	939325	113 PCT
2. POM James Gherardi	03975	944592	113 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM James Gherardi	Abuse: PO James Gherardi stopped the vehicle in which § 87(2)(b) was an occupant.	
B.POM Timothy Rizzo	Abuse: PO Timothy Rizzo stopped the vehicle in which § 87(2)(b) was an occupant.	
C.POM Timothy Rizzo	Abuse: PO Timothy Rizzo frisked § 87(2)(b)	
D.POM James Gherardi	Abuse: PO James Gherardi searched the vehicle in which § 87(2)(b) was an occupant.	
E.POM Timothy Rizzo	Abuse: PO Timothy Rizzo refused to provide his shield number to § 87(2)(b)	
§ 87(4-b) § 87(2)(g)		
§ 87(4-b) § 87(2)(g)		

Case Summary

On September 4, 2015, at approximately 1:33 a.m., PO Timothy Rizzo and PO James Gherardi, both of the 113th Precinct, stopped § 87(2)(b) who was driving a rental vehicle, near the intersection of Baisley Boulevard and Bedell Street in Queens (**Allegations A and B**). PO Rizzo and PO Gherardi both testified that upon approaching the vehicle, they shined their flashlights in the vehicle, and noticed a bottle of liquor therein, on the floor of the backseat. PO Rizzo then asked § 87(2)(b) to exit the vehicle, and consequently frisked him (**Allegation C**). While § 87(2)(b) was speaking to PO Rizzo, PO Gherardi searched his vehicle, but the extent of this search remains in dispute (**Allegation D**). § 87(2)(b) reported that at this point, he requested PO Rizzo's name and shield number, and PO Rizzo allegedly ignored his request (**Allegation E**).

There is no video footage capturing this incident.

Mediation, Civil and Criminal Histories

- § 87(2)(b) rejected mediation.
- On December 16, 2015, an inquiry was sent to the NYC Comptroller's Office regarding whether § 87(2)(b) has filed a Notice of Claim regarding this incident. Results are pending and will be included in the case file upon their receipt.
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]
[REDACTED]
[REDACTED]
[REDACTED]

Civilian and Officer CCRB Histories

- This complaint is § 87(2)(b)'s second with the CCRB. § 87(2)(b)
[REDACTED]
[REDACTED]
- PO Gherardi has been a member of the NYPD for eight years, and has no substantiated CCRB allegations against him (Board Review 11).
- PO Rizzo has been a member of the NYPD for ten years, and has four substantiated CCRB allegations against him. In CCRB case number 201104699, stop, frisk and personal search allegations were substantiated against PO Rizzo, and the Board recommended charges for all of them. The NYPD disposition for all three allegations was no disciplinary action. In CCRB case number 201501773, a stop allegation was substantiated against PO Rizzo, and the Board recommended Command Discipline B. The NYPD Disposition and Penalty for this allegation are still pending. In case 201311828, a frisk allegation was unsubstantiated against him. In case 201506148, a vehicle stop allegation was unsubstantiated against him (Board Review 12).

Findings and Recommendation

Allegation A—Abuse of Authority: PO James Gherardi stopped the vehicle in which § 87(2)(b) was an occupant.

Allegation B—Abuse of Authority: PO Timothy Rizzo stopped the vehicle in which § 87(2)(b) was an occupant.

§ 87(2)(b) testified that because he was talking on the phone and about to go to the store, he stopped and parked his car, at which point, he was approached by PO Rizzo and PO Gherardi. He said that at the end of the stop, PO Rizzo told him that he had not signaled upon turning prior to parking his car. During his CCRB interview, § 87(2)(b) said that he had signaled when he parked his vehicle.

PO Rizzo and PO Gherardi both testified that they stopped the vehicle § 87(2)(b) was driving after observing § 87(2)(b) fail to signal upon turning west from Marsden Street onto Baisley Boulevard. PO Rizzo and PO Gherardi ultimately decided to release § 87(2)(b) with a warning.

Because the officers observed § 87(2)(b) fail to signal while he was driving, a vehicle stop is being pleaded.

Police officers may stop a vehicle when they have reasonable suspicion that the driver or any occupant of said vehicle has committed, is committing or about to commit a crime. *People v. Taylor*, 31 A.D.3d 1141 (4th Dept. 2006) (Board Review 07). A vehicle stop due to probable cause of the occurrence of a traffic violation is a reasonable detention per the Fourth Amendment even if an additional law enforcement purpose ultimately precipitates the stop. *Whren v. United States*, 517 U.S. 806 (1996) (Board Review 09).

§ 87(2)(g)
[REDACTED]

Allegation C—Abuse of Authority: PO Timothy Rizzo frisked § 87(2)(b)

It is undisputed that PO Rizzo frisked § 87(2)(b) over his torso, waistband, pockets, and pants legs, after asking him to exit the vehicle.

§ 87(2)(b) never mentioned having an open bottle of liquor in the vehicle, including that officers found one, removed it from the vehicle, and asked him about it.

PO Rizzo stated that the alcohol was a bottle of vodka, whereas PO Gerardo stated that it was filled with a dark liquid.

Both officers stated that upon finding the bottle, PO Rizzo asked § 87(2)(b) to exit the vehicle. PO Rizzo asked § 87(2)(b) to exit the vehicle because the bottle's presence raised his suspicion that § 87(2)(b) could be driving while intoxicated. When § 87(2)(b) exited the vehicle, PO Rizzo immediately conducted a frisk in order to ensure that § 87(2)(b) did not have any weapon on his person. When asked whether he suspected § 87(2)(b) of having any weapon, PO Rizzo said that he could not be sure, and that when he was "in close proximity to someone [he] suspected of committing a crime," he had to check for his safety and that of his fellow officers. PO Rizzo

observed a bulge in § 87(2)(b)'s right pocket, which was square shaped, approximately the size of a wallet, and appeared to be made by a hard object, which he determined from the frisk was a wallet. However, PO Rizzo testified that he believed it could have been a “cell phone stun gun” or a “pocket firearm” PO Rizzo denied that there was anything else § 87(2)(b) did or said that prompted him to believe that § 87(2)(b) was in possession of a weapon. PO Gherardi denied that he suspected § 87(2)(b) of being in possession of any weapon at the time that PO Rizzo frisked him. He testified that he was not close enough to § 87(2)(b) to observe any bulge on his person. PO Gherardi denied suspecting § 87(2)(b) of any other crime besides driving while intoxicated. After talking to § 87(2)(b) the officers determined that he was not intoxicated, and released him with a warning.

An officer is authorized to frisk an individual only if the officer reasonably suspects that the individual threatens physical injury to the officer by virtue of being armed. *People v. DeBour*, 40 N.Y.2d 210 (1976). The officer's fear for his safety cannot be based on a general inclination; it must be articulable and specific. *People v. Barreto*, 161 A.D.2d 305. While certain bulges in an individual's clothing are likely indicators that the individual possesses a weapon, such as a waistband bulge or a bulge whose shape resembles that of a firearm, pocket bulges of undefined shape are very often caused by innocuous objects and do not justify a frisk. *In the Matter of David B. (Anonymous)*, 172 A.D.2d 828 (App. Div. 2nd Dep't. 1991). When observing behavior that lends itself to innocent interpretation, officers should exercise constructive restraint that precludes them from probing for weapons without describable conduct or the demonstrable presence of a describable object. *People v. Cornelius*, 113 A.D.2d 666 (1986) (Board Review 09).

§ 87(2)(g)

Allegation D—Abuse of Authority: PO Gherardi searched the vehicle in which § 87(2)(b) was an occupant.

It is undisputed that PO Gherardi shined his flashlight into § 87(2)(b)'s vehicle upon approaching it. § 87(2)(b) further alleged that while he was talking to PO Rizzo behind his vehicle, PO Gherardi opened the passenger's door of the vehicle, and entered it, placing his whole body

therein. § 87(2)(b) was not sure whether PO Gherardi opened any of the vehicle's back doors, or searched the backseats. § 87(2)(b) said his wallet was in the center console of the front seat, so believed that it was searched as well. § 87(2)(b) did not know whether PO Gherardi searched the glove compartment, but believed that the search lasted about three to four minutes. § 87(2)(b) also alleged that PO Gherardi searched the trunk. PO Rizzo and PO Gherardi both testified that when they shined their flashlights into § 87(2)(b)'s vehicle, they saw an opened bottle of liquor on the floor of the backseat, which prompted them to suspect that he could be drinking and driving. PO Rizzo then asked § 87(2)(b) to exit the vehicle. PO Rizzo and PO Gherardi both testified that PO Gherardi opened the back door of the vehicle on the passenger's side, and removed the bottle of liquor. PO Gherardi denied conducting any additional search of the vehicle, and PO Rizzo did not believe that PO Gherardi conducted any further search of the vehicle or put his whole body inside the vehicle.

Upon stopping a vehicle for an infraction of Vehicle and Traffic Law, it is permissible for an officer to make outside visual inspections, including shining a flashlight into the interior of the vehicle, and ordering the driver and all occupants out. *People v. Robinson*, 97 N.Y.2d 638 (2001). The plain view doctrine allows the seizure of illegal objects or incriminating evidence immediately seen by officers. *People v. Taylor*, 2013 App. Div. LEXIS 1415 (2013). New York State Vehicle and Traffic Law § 1227 delineates that any operator or passenger in possession of an open container containing an alcoholic beverage in a motor vehicle located upon the public highway is guilty of a traffic infraction (Board Review 07).

§ 87(2)(g)

Allegation E—Abuse of Authority: PO Timothy Rizzo refused to provide his shield number to § 87(2)(b)

§ 87(2)(b) testified that he asked PO Rizzo for his name and shield number approximately three times, and PO Rizzo ignored this request each time. However, at the conclusion of their interaction, PO Rizzo told § 87(2)(b) his name. § 87(2)(b) said that he obtained PO Rizzo's tax number, which he provided to the CCRB upon filing this complaint, from another officer to whom he spoke at the 113th Precinct stationhouse on a date after this incident. PO Rizzo and PO Gherardi's testimonies were consistent that § 87(2)(b) requested PO Rizzo's name and shield number one time, at the conclusion of the incident, and PO Rizzo provided the requested information.

§ 87(2)(g) [Redacted]
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§ 87(4-b) § 87(2)(g) [Redacted]
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Pod: 11

Investigator: _____
Signature Print Date

Pod Leader: _____
Title/Signature Print Date

Attorney: _____
Title/Signature Print Date